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No. 1014

IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

REVEREND GEORGE BURDIKOFF, STEPHAN LOBODA, HARRY YAVORNITZKY, MICHAEL YUHAS and ANDREW PATRICK,

Petitioners,

v.

THE RUSSIAN ORTHODOX GREEK CATHOLIC ST. PETER and ST. PAUL'S CHURCH OF LORAIN, OHIO, GREGORY SANDOR, MIKE HRUBIC, MIKE CHEMEROV, MIKE KAWOLCHYK, as individuals and officers of the Russian Orthodox Greek Catholic St. Peter and St. Paul's Church of Lorain, Ohio,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS, LORAIN COUNTY, OHIO, NINTH JUDICIAL DISTRICT OF OHIO.

BRIEF FOR RESPONDENTS IN OPPOSITION.

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INDEX.

	PAGE
OPINION BELOW	1
JURISDICTION	2
QUESTION PRESENTED	2
STATEMENT	2
ARGUMENT:	
I—The decision below is based and may be supported on adequate and independent non-federal grounds	5
II—The courts below had no power or right to subvert the status of the Lorain church of the Metropolia as they have existed for nearly forty years; and, as courts of equity, they should not and could not, by sanctioning Burdikoff's clandestine and purchased treachery, participate in securing to him and the Moscow Patriarchate the rewards thereof	6
III—Moreover, in his now professed role as an agent and representative of the Moscow regime, Burdikoff is barred by the 1925 judgment of the Court of Common Pleas quieting title in the respondent corporation as a unit of the Metropolia and as against representatives of the Moscow regime	17
IV—Also the respondent corporation's title to and rightful possession of this church and its properties as units of the Metropolia are now conclusively established by nearly forty years of open possession under claim of exclusive title adverse to all the world, and by the absence of any suit by a counterclaimant within the period of limitations (Section 2305.04, Ohio Revised Code)	19

PAGE

V—Burdikoff, now claiming through and as a representative of the Moscow Church, is also barred and estopped by his long, open and professed allegiance to the Metropolia whereby he continuously secured from it pastorates, emoluments and public status; and the Moscow Church is likewise barred and estopped by its laches and failure for nearly forty years to attempt to establish any suzerainty over this parish 21

VI—The *St. Nicholas Cathedral Case*, 344 U. S. 94, and 363 U. S. 190, is the reverse of the present case; and in no event can have any bearing here 24

VII—Even if, contrary to the foregoing principles, the Court should find occasion to examine the canonicity of the Metropolia, it is not bound by anything in the *Kreshik* case to outlaw the Metropolia 25

VIII—Respondents are not estopped by the *Saint Nicholas Cathedral Case* 28

IX—The St. Nicholas Cathedral decisions are authorities for, not against, respondents' position 29

X—Respondents' entire "argument" is open acknowledgment of their real objective in this suit, namely, to seek a ruling which could be used to oust the entire Metropolia from *all* its parishes, seminaries and properties, and to transfer possession and authority to the Moscow Patriarchate with power to dispossess by court decree and by ecclesiastical excommunication hundreds of thousands of Americans who for two generations have worshipped under, and enlarged by their means, the Metropolia 31

CONCLUSION 36

Table of Cases.

	PAGE
Communist Party v. *Control Board*, 367 U. S. 1, 4, 5; *Scales* v. *United States*, 367 U. S. 203	33
Elder v. *McClaskey*, 1895, CCA 6th, 70 Fed. 529	21
Engel v. *Vitale*, 370 U. S. 421	12, 13
Greek Catholic Church of St. Michaels v. *Archbishop Platon Roizdestvensky*, 67 Colo. 217, 184 Pac. 295, 18 A. L. R. 690	30
Hackett v. *Hackett*, 78 OLA 185, 150 N. E. 2d 431	11
Puckett v. *Jessee*, 195 Va. 919, 81 S. E. 2d 425	21
Romanian Orthodox Missionary Episcopate of America v. *Trutza*, 120 F. Supp. 183, aff'd 209 F. 2d 107, cert. den. 346 U. S. 915, motion to file pet. for cert. den. 364 U. S. 809	13, 32
Russian Orthodox Church of the Transfiguration v. *Lisen*, unreported (Superior Court of California, Los Angeles County, November 29, 1948)	15, 32
Ruszko v. *Kaimakan*, 108 N. J. Eq. 34, 153 Atl. 651	6, 21
Saint Nicholas Cathedral Case, 344 U. S. 94 and 363 U. S. 190	9, 10, 13, 14, 15, 24, 29
St. Nicholas Cathedral v. *Kedroff*, 276 App. Div. 309, 302 N. Y. 1, 96 N. E. 2d 56; 306 N. Y. 38, 114 N. E. 2d 197	13, 29, 34
St. Nicholas Cathedral v. *Kreshik*, 9 Misc 2d (N. Y.) 1069; 7 N Y 2d 191, 164 N. E. 2d 687	9, 13, 24, 25, 26, 30, 33
St. Nicholas Ruthenian Ukrainian Greek Catholic Church v. *Kapsho*, 202 Misc. [N. Y.] 893, 114 N. Y. S. 2d 27	6, 20
St. Paul's Reformed Church v. *Hower*, 191 Pa. 306, 43 Atl. 221	21
Waipa v. *Kushwara*, N. Y. L. J. January 6, 1940, aff. 259 App. Div. 843, motion for leave to appeal den. 283 N. Y. 780	23
Watson v. *Jones*, 80 U. S. (13 Wall.) 679	6, 35

STATUTES.

	PAGE
28 U. S. C. 1257(3)	2
National Security Act, 50 U. S. C. A. §§781, Sec. 2(3) and (2)	33
Ohio State Constitution, Section 7 of Article I	10
Ohio Revised Code, Section 2305.04	19, 21
§§105 and 107 of Article 5-C of the Religious Corporations Law of the State of New York (50 McKinney's N. Y. Laws)	29

OTHER AUTHORITIES.

Columbia Encyclopedia [1946 ed.] p. 1314	34
Orientalia Christiana, vol. I, 1923, p. 137, Pontifical Oriental Institute, Rome	7n

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Opinion Below.

The opinion below, a copy of which is attached to the petition as Appendix A (p. 33), is reported at 117 Oh. App. 1; also 189 N. E. 2d 451.

Jurisdiction.

The orders of the Supreme Court of Ohio, refusing to review the decision of the Court of Appeals, were entered on December 19, 1962. A timely petition for rehearing was denied by the Supreme Court on January 16, 1963. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3).

Question Presented.

Is the decision below based on adequate and independent non-federal grounds?

Statement.

The state Court of Appeals, which tried the case de novo on the same testimony and exhibits as those presented to the trial court, found the following facts (Opinion of Court of Appeals, Appendix A to petition, p. 33):

1. In April, 1924, representatives of the Russian Orthodox churches in the United States met in a convention, or sobor, in Detroit. The sobor declared itself an administratively autonomous metropolitan district, now known as the Metropolia and since 1924 accepted as the leading Russian Orthodox Church in America. It has two theological seminaries and many churches.

2. The Reverend George Burdikoff was first a priest in a group of Russian Orthodox churches known as the Anastassy Synod or Russian Church Abroad. He later switched his allegiance to the Metropolia, the ruling archbishop of which is now Metropolitan Leonty. Later again he switched his allegiance to the Patriarch of Moscow.

3. The Church of St. Peter and St. Paul in Lorain and its members were faithful followers of the Patriarch of Moscow from the time of the founding of the Lorain church in 1912 until in 1925, when they accepted the authority of the Metropolia.

4. In February, 1925, a new church building and improvements were contemplated and the church corporation filed an action to quiet title against Bishop Alexander Nemolovsky of the Russian Orthodox Church and others into whose names title to the church property had been previously transferred. The action was followed by submission to the Metropolia.

5. Since 1925 the Lorain Church and its congregation have been served by a priest who accepted the authority of the Metropolia. It sent clergy and lay delegates to functions as well as sobors of the Metropolia. The Lorain church in all things supported the Metropolia and has supported financially no other church group, except as it may have done so under the authority of the Metropolia.

6. The Reverend George Burdikoff was active in the affairs of the Metropolia and its deanery [Ohio] until in June, 1960, he secretly accepted the authority of the Patriarch of Moscow. He thereafter received appointment to the Lorain church as a priest subject to that religious prelate.

7. The Metropolia has declared itself to be an autonomous body whose doctrine, discipline and worship are those of the one Holy Catholic and Apostolic Church, as taught by Holy Scripture, Holy Tradition, the Seven Ecumenical Councils and the Holy Fathers and as kept by the Orthodox Churches of the East.

8. The Metropolia is a member of the World Council of Churches, which accepts into its membership only autonomous church bodies. The Patriarch of Moscow has brought the Russian Orthodox Church into the World Council of Churches, thereby recognizing the Metropolia as an autonomous Church.

9. For 35 years the Church [Patriarchal] which formerly claimed spiritual and temporal jurisdiction has done nothing to oust the group [Metropolia] which it calls schismatic from occupation and control of the Lorain church. It now seeks to do so by the subterfuge of a priest who has switched allegiance when it best served his personal interest.

10. When the action of The Reverend George Burdikoff became known to the congregation, complaint was made to the superior officers of the Metropolia in whose jurisdiction the Lorain church had functioned for 35 years. The Reverend George Burdikoff was ordered to move to a new parish and, upon his refusal to do so—he claiming that these former superior ecclesiastics did not now have spiritual or temporal jurisdiction over him—he was deposed as a priest of the Metropolia.

11. Bishop John of the Metropolia, with the blessing of the Metropolitan Leonty, and at the proper request of the members of the Lorain church, then ordered a congregational meeting. At this meeting the officers and trustees of the parish (respondents here) were elected. These officials and the parish corporation instituted the present action.

12. The money in banks, church money in the hands of the one who was acting as treasurer at the time of the

attempted change to allegiance of the Patriarch of Moscow, and such other church funds on hand at the time when The Reverend George Burdikoff sought to bring the church into the patriarchate, were monies contributed by those who accepted Metropolitan Leonty as their spiritual leader.

13. The real property in the instant case was used openly by those claiming the Metropolia as the church authority under which the Lorain church functioned. Title to the church lands was in the corporation, whose officers held it for the use of the Metropolia. This provision for the use and benefit of the Metropolia lasted 35 years before a challenge was made by The Reverend George Burdikoff, acting for the Patriarch of Moscow.

14. Those who accept Metropolitan Leonty and the Metropolia have expended money on the church property. They have in all things held the church out to the general public, to other church bodies and to the Patriarch of Moscow as an integral part of the autonomous Russian Orthodox Greek Catholic Church of America.

Argument.

POINT I.

The decision below is based and may be supported on adequate and independent non-federal grounds.

The basis of the decision is clearly stated by Judge Hunsicker:

> ". . . surely waiver, estoppel and laches constitute valid reasons why the Patriarch of Moscow should not now be permitted to claim spiritual jurisdiction of this church [Citing cases]". Pet. p. 40.

(In addition to the cases cited by Judge Hunsicker, see *St. Nicholas Ruthenian Ukrainian Greek Catholic Church* v. *Kapsho*, 202 Misc. [N. Y.] 893, 114 N. Y. S. 2d 27; also cf. *Ryszko* v. *Kaimakan*, 108 N. J. Eq. 34).

The application of the doctrines of waiver, estoppel and laches to the facts of this case involved no federal question. The state courts of Colorado, Virginia, Pennsylvania, New York and, inferentially, New Jersey have applied those doctrines to controversies over the use of church property.

POINT II.

The courts below had no power or right to subvert the status of the Lorain church or of the Metropolia as they have existed for nearly forty years: and, as courts of equity, they should not and could not, by sanctioning Burdikoff's clandestine and purchased treachery, participate in securing to him and the Moscow Patriarchate the rewards thereof.

(1) In *Watson* v. *Jones*, 80 U. S. (13 Wall.) 679, this Court said (p. 728):

> "In this country the full and free right to entertain any religious belief, to practice any religious principle, and to teach any religious doctrine which does not violate the laws of morality and property, and which does not infringe personal rights, is conceded to all. The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect. * * *"

Here the Metropolia has been for nearly forty years a large, established, recognized and independent religious body with a full and continuously operating ecclesiastical organization. It is recognized by the National Council of

the Churches of Christ in the U. S. A. and by the World Council of Churches (Tr. 20, 21); and it has been for many years accepted by them as a legitimate voting member in good standing. Metropolitan Leonty has been since its inception a member of the Standing Conference of Canonical Orthodox Bishops in the Americas (Tr. 101-4).

The Metropolia has approximately 395 priests and 429 parishes and chapels and two seminaries as well as monasteries and convents (Tr. 14, 15). It has its own hierarchy and a Primate as its chief ruler. It accepts no other ecclesiastical sovereignty.*

For nearly forty years the membership and parishes of the Metropolia have been contributing to its support; new parishes have been constantly established; properties have been acquired; ecclesiastics have been elected and ordained; missionary work has been widely carried on in its name; and new adherents, many of whom are American citizens, have joined.

Under these circumstances and under the First and Fourteenth Amendments guaranteeing separation of Church and State, no civil court can now subvert the Metropolia, or outlaw its independent existence and government and hierarchs, or impose upon it another and foreign ecclesiastical ruler whom it does not recognize as such.

* Petitioners are in error in suggesting that the Metropolia since 1924 has ever acknowledged itself to be subject to the Moscow Patriarch. They refer (Pet. p. 12) to an epistle of Metropolitan Leonty stating that the Metropolia had not recognized "consecration of the Ukrainian 'Independent' autocephalous groups and the Self consecrate, recognizing only those consecrations, which were recognized by the Patriarch of Moscow and All Russia." The Ukrainian "self consecration" took place on October 10/23, 1921 (Orientalia Christiana, vol. I, 1923, p. 137, Pontifical Oriental Institute, Rome) when Tikhon was Patriarch. Since the "self consecration" took place in Russia it was natural for Leonty to follow the canonical ruling made by the head of the Church in that country.

For nearly forty years the Lorain church has been a recognized and accepted unit of the Metropolia; a member of one of its dioceses and deaneries; a subject of one of its bishops and of its Primate, and a contributor to its support. The rectors of the Parish have come to it by appointment or approval of the Metropolia's Primate (Tr. 64). Its congregations have continuously prayed for God's blessing on its bishop and Primate. Property has been acquired by it as a unit of the Metropolia and as dedicated to the religious purposes of the Metropolia.

(2) What petitioners are now demanding is that a court of equity reverse and invalidate all this history; declare it a sham and an illusion; ignore Burdikoff's own and repeated vows of allegiance, his representations of his ecclesiastical status as a priest of the Metropolia before his congregations, his colleagues in his deanery and in the Sobors of the Metropolia and to its Primate himself; disregard all the personal benefits and emoluments which he has derived thereby and therefrom; and treat the entire Metropolia as a schismatic, illegal nullity.

In effect, petitioners are calling upon a court of equity to sanction the secrecy, concealment and chicanery by which Burdikoff has sought to retain his post in Lorain notwithstanding his long-acknowledged superior's directions to take the pastorate of another parish, and to accomplish this by surreptitiously switching his allegiance and grabbing the Lorain parish as the price to be paid for his attempted subversion of it and for his own admission into another religious body.

No acute discernment is required to see that behind Burdikoff and the sudden and deft switch which was arranged for him is a scheme to attempt to seize for Moscow under guise of judicial precedent and procedure all of the

parishes and properties of the Metropolia by imposing upon them a Moscow Rule which as American institutions and citizens and in their exercise of the freedom of religion they long ago were obliged by Communist persecution of the Church in Russia to put aside. The scheme is to be advanced by enticing priests into defection and our courts into ecclesiastical obscurantisms as to heresy and schism.

(3) In 1924 when the All American Sobor met, the tie between the American Church and the Moscow Patriarchate had been broken by the Bolsheviks and the official adoption by the Communist Dictatorship of Atheism as the State creed.

As said by Judge Epstein in *St. Nicholas Cathedral* v. *Kreshik*, 9 Misc 2d (N. Y.) 1069, 1076: The Russian Church was "a tool exploited by the State".

In addition, precisely as in the case of the American Revolution, forces inherent in the current circumstances and in the great gulf between the American and the Communist ways of life, led to compulsive desires for separation and independence.

Time, the looming Communist conspiracy for world dominion, the Cold War, the arming of the Free World to protect its own survival, and the shrunken and servile state of the old Church under Communism, have accentuated this need and this movement for separation and independence.

In the second *Saint Nicholas* case, 363 U. S. 195, 191, this Court acknowledged that the New York Court of Appeals had found as a fact "the domination * * * of the Patriarch by the secular authority". It made no attempt to overrule or vacate that finding, as indeed it could not.

As long as the First Amendment stands, and Separation of Church and State is an American fundamental, no American court lawfully or physically can reverse this process,

annul this history, change the world crisis, or play the marshall to usher the Moscow Patriarch into possession of the churches, seminaries, monasteries, convents and properties of the Metropolia, and usher out the Metropolia's priesthood and people.

For the very reason that this Court held that no American court could thrust the appointees of the Church in Russia out of their forty-year possession of the Saint Nicholas Cathedral and put the Metropolia into it, the Patriarchate cannot use the American courts to thrust the Metropolia out of its forty-year possession of its churches and put the Patriarchate into them. To do so would be, as said in the first *Saint Nicholas* case, 344 U. S. 94, 119, to displace "by fiat • • • one church administrator with another".

The million communicants of the Metropolia have the right, in their constitutional exercise of the freedom of religion, to feel that now, less than ever, can they safely bow their necks to a foreign Ecclesiastic so obviously under restriction and control by an atheist foreign Power openly hostile to the freedom of themselves and of their native United States.

But even if this were otherwise, it is still fundamental American constitutional law that American courts take religious denominations as they find them; do not attempt either to take them apart or to combine them; and do not stop to listen to the cries of heresy and schism by one against another.

(4) But this whole subject is really concluded by Section 7 of Article I of the Ohio State Constitution which reads:

> "All men have a natural and indefeasible right to worship Almighty God according to the dictates of their own conscience. No person shall be compelled to attend, erect, or support any place of worship, or maintain any form of worship, against his con-

> sent; and no preference shall be given, by law, to any religious society; nor shall any interference with the rights of conscience be permitted. No religious test shall be required, as a qualification for office, nor shall any person be incompetent to be a witness on account of his religious belief; but nothing herein shall be construed to dispense with oaths and affirmations. Religion, morality, and knowledge, however, being essential to good government, it shall be the duty of the general assembly to pass suitable laws to protect every religious denomination in the peaceable enjoyment of its own mode of public worship, and to encourage schools and the means of instruction. (See Const. 1802, Art. VIII, §§3, 25.)"

In *Hackett* v. *Hackett*, 78 OLA 485, 150 N. E. 2d 431, the court held that the force of this constitutional provision is to make observance of religious doctrine a matter of personal choice uncontrolled by law or decree of a court.

In consequence, where, under the protection of this constitutional provision, the Lorain Church and its congregation became nearly forty years ago a unit of the Metropolia and continued therein in accordance with their personal religious choice and the dictates of their own consciences, no foreign ecclesiastic can now be permitted to veto their religious freedom and to demand that they and their church become subjects of his for government from Moscow. And the same constitutional principles support the lawful entity of the Metropolia and its continuous recognized existence from 1924. No foreign ecclesiastic or jurisdiction can demand that an American court now deny religious freedom to the Metropolia and its adherents or force it or them against their own consciences to accept religious tenets, forms of worship or adherences which they have opposed.

(5) On June 25, 1962, this Court handed down a decision in the *Regents Prayer* case which still further defines the limits on the power of a State to intrude into the forbidden area of religious freedom (*Engel* v. *Vitale*, 370 U. S. 421).

The following excerpts from the opinion of the majority (Mr. Justice Black) and of Mr. Justice Douglas' concurring opinion are precisely applicable to the present case:

> "... The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its 'unhallowed perversion' by a civil magistrate" (370 U. S. at pp. 431-2).

> "... The First Amendment leaves the Government in a position not of hostility to religion but of neutrality. The philosophy is that the atheist or agnostic— the nonbeliever—is entitled to go his own way. The philosophy is that if government interferes in matters spiritual, it will be a divisive force. The First Amendment teaches that a government neutral in the field of religion better serves all religious interests" (370 U. S. at p. 443).

Yet, in the case at bar, petitioners sought exactly contrary action by the State of Ohio through the power of its civil magistrates,—namely, state action (1) to frustrate the religious beliefs and established and religious government of hundreds of thousands of American residents and citizens who, since 1924 and for religious reasons which a "neutral state" can have no power to override, have exercised their constitutional rights to religious freedom; and (2) to strip them of the religious properties which they, their forefathers and descendants through the decades have accumulated for the practice and furtherance of their religious beliefs; and (3) to deny to them the right to con-

tinue with and under the ecclesiastical hierarchy which they have chosen and to which they have openly maintained allegiance for nearly forty years; and (4) to confirm all this substitution and seizure by having the State of Ohio lend its force through its courts in sanction and implementation of a sordid and surreptitious defection contrived or abetted by a foreign ecclesiastical regime.

In its ultimate analysis, petitioners, as self-professed agents of such foreign ecclesiastical regime, made a claim for exertion of the power of the State of Ohio through its courts which was the exact opposite and antithesis of their superiors' claim successfully made in the *Saint Nicholas Cathedral* case, that the then existing hierarchal control of the cathedral could not be displaced and superseded by exertion of the power of the State of New York either through its legislature (*Kedroff*) or through its courts (*Kreshik*).

In short, petitioners' claim called upon the Ohio courts for action through the power of the State in an Establishment of Religion far more gross than the Establishment of Religion through exertion of the power of New York stricken down by this Court in the *Regents Prayer* case.

(6) Directly in point is *Romanian Orthodox Missionary Episcopate of America* v. *Trutza*, 120 F. Supp. 183, aff'd 205 F. 2d 167, cert den. 346 U. S. 915, motion to file pet. for cert. den. 364 U. S. 809.

There, prior to World War II the Romanian Orthodox Church had established a missionary diocese in the United States to serve the spiritual needs of its adherents who had come to America. When the Russian Communist armies conquered Romania, they established a Stalinist dictatorship and took captive the native Church, which thereupon was forced to go through the form of appoint-

ing one Moldavan a supreme bishop to take over the American diocese and put out all ecclesiastics and communicants who would not submit to him. Thus the case was the reverse of the *Saint Nicholas* case. The Communist-dominated Church in Romania was trying to thrust itself into the Romanian churches in America, and they resisted.

The United States Court of Appeals upheld the right of the Romanian Church in America to *administrative independence* and to select the clergy. The Court said that this right was under constitutional protection, and that (p. 112):

> "* * * Since this is true as to protection against the interference of an individual American state, we think it should be equally true as to protection against the domination and interference of a foreign state."

We respectfully suggest that the ensuing denial of a petition for writ of certiorari (346 U. S. 915) and of a motion for leave to file a petition for writ of certiorari (364 U. S. 809) may be deemed a determination by this Court that the decisions therein below had not violated the First Amendment—particularly since the denial of that petition followed by a year the decision in the *St. Nicholas Cathedral* case, (344 U. S. 94), and also followed by two weeks the refusal of this Court to permit the defendants in that case to file a petition to mandamus the Court of Appeals of New York (346 U. S. 893) and the denial of that motion followed by four months the June 6, 1960 decision in the *St. Nicholas Cathedral* case.

The decision of the District Court, thus affirmed by the United States Court of Appeals, gave an affirmative answer to its following formulation of the issue for decision (120 F. Supp. at p. 185):

> "I repeat, all that this Court must determine is whether or not the Episcopate in the United States possessed *administrative autonomy* to elect its own bishop. * * *" (Emphasis ours.)

(7) Mr. Philip Adler, counsel for the defendants in the *St. Nicholas Cathedral Case*, cited the unreported decision of the Superior Court of California, Los Angeles County, rendered on November 29, 1948, in *Russian Orthodox Church of the Transfiguration* v. *Lisen*—a decision also referred to by Judge Epstein on the second trial of the *Saint Nicholas Cathedral Case*.

Actually, that decision, as we shall now show, is a square authority for plaintiffs in the present action.

Mr. Adler overlooked the *findings* therein on the very issue which he himself pressed upon the California court and which precisely sustain and determine respondents' side of the issue in the present case.

That California litigation was between two opposing factions in the local parish, one adhering to "The Church Abroad" (Anástassy Synod), and the other adhering to the Metropolia under Metropolitan Theophilus. The trial court determined that, for local historical reasons affecting the particular parish, the former faction had the better right to parish control; but the part of the decision which is pertinent to this action is the court's adverse ruling on the very issue which Mr. Adler sought to inject and which petitioners now seek to present here. The court stated as follows that issue (the very issue here) and also Mr. Adler's injection of it (p. 10):

> "The Moscow Administration has never been a party to this action. However, upon completion of the evidence Attorney Phil Adler, of New York, chief counsel for Archbishop Makary, came before this court, with a local firm of attorneys, and asked

> leave to appear as amicus curiae. Permission to do so was granted by the court and Mr. Adler made an argument by which he urged that the court find that neither of the parties was canonical and that all parishes of The Church in North America were subject to Archbishop Makary and Patriarch Alexy and his executive organs."

On that issue thus injected and urged by Mr. Adler (namely the very issue here present), the California trial court refused to allow Makary to intrude into the American Churches, and made the following determination and finding squarely adverse to the "Moscow Administration" and Patriarch Alexy (p. 49):

> "Purely and solely for purposes of political expediency, the communist regime within Russia has from time to time since 1917 permitted an outward form of religious organization to exist within the territory of Russia and within territory controlled by the Russian state, and an outward form of religious organization was in 1946 and is now permitted to exist within Russia, known as the so-called Patriarchal Church, headed by the so-called Patriarch Alexy, but such forms of church organization that were permitted to exist within Russia since 1917 to the present time have been and are completely under the domination and control of the communist regime."

We submit that it would be impossible to find, in so short a compass, judicial language which so perfectly fits the present case.

We also point out that Mr. Adler's aforesaid contention before the California court that "all parishes of The Church in North America were subject to Archbishop Makary and Patriarch Alexy and his executive organs" illuminates as with a lightning flash the real stake in the

instant suit,—the purpose of the Patriarchate to win a legal foothold for claiming all parishes of the Russian Orthodox Faith in America, and their vast properties.

POINT III.

Moreover, in his now professed role as an agent and representative of the Moscow regime, Burdikoff is barred by the 1925 judgment of the Court of Common Pleas quieting title in the respondent corporation as a unit of the Metropolia and as against representatives of the Moscow regime.

The Lorain church participated in the All American Sobor of 1924 (Tr. 557) and in the establishment thereat of the independent Metropolia.

In 1925 respondent corporation, then a unit of the Metropolia and under the jurisdiction of its then Metropolitan Platon, sued to quiet in itself the title to the church and its real properties which had theretofore ostensibly been conveyed by certain individuals claiming to be owners thereof to Bishop Alexander, an ecclesiastic of the Moscow regime.

The petition, answer, proofs of jurisdiction over all parties defendant and the judgment of the court are in evidence here as Pl. Ex. 3.

The judgment quieted the title in this respondent corporation; adjudicated that, at the time of the bringing of the suit, the plaintiff was in possession and the rightful owner; that the defendants were not entitled to ownership or possession; and that the individual defendants should convey to this respondent, which they did by deed filed September 2, 1925 (Pl. Ex. 18).

From that day to this neither Bishop Alexander nor any other representative of the Moscow regime ever moved in that suit to open, set aside or modify that judgment. Nor has Burdikoff, who now professes to be a representative of that regime.

What Burdikoff cannot now do directly, he cannot do by indirection. The 1925 judgment by its very nature, by its terms and by the great lapse of time, has settled against Burdikoff and any other representative of the Moscow regime the status of this respondent corporation and its properties as constituent parts of the Metropolia. As long as it stands, it is *res judicata* and an estoppel; and hence it is a bar to any action by the Ohio courts which would have the effect of turning over to Burdikoff or any other representative of the Moscow regime respondent corporation and its properties.

The law is elementary that such a judgment concludes both the issues adjudicated and also the issues which might have been pleaded and adjudicated.

The courts of law are open only to the vigilant. For nearly forty years the Patriarchate has not presented, much less pushed in the courts, any claim to the Lorain church. Its silence is the equivalent of acquiescence; and its present belated activity, only a few months old, is stale and tainted with furtiveness and artifice and with prior decades of acquiescence and laches as regards this 1925 judgment.

POINT IV.

Also the respondent corporation's title to and rightful possession of this church and its properties as units of the Metropolia are now conclusively established by nearly forty years of open possession under claim of exclusive title adverse to all the world, and by the absence of any suit by a counterclaimant within the period of limitations (Section 2305.04, Ohio Revised Code).

Burdikoff is now claiming that by his having been furtively admitted on June 21, 1960, to the Moscow Church and blessed as a priest thereof by its Dositheus, the continuous ownership and possession since 1924 by respondent corporation in its capacity as a unit of the Metropolia has vanished into thin air, and that by his own unilateral act of defection a new ecclesiastical owner has taken over and the Metropolia is ousted.

No deed to such effect exists. No vacating, surrender or abandonment by the Metropolia has ever occurred. No consent by the Primate or any judicatory of the Metropolia has ever been given, or indeed has ever been asked.

For nearly forty years the Moscow regime, if it thought it had a claim, had the physical power to voice it or to sue to make it good. For nearly forty years the Moscow regime had daily opportunity to assert that the Lorain church was in schism and under a priest and a jurisdiction which were schismatic, and hence removable by the courts at its instance as the rightful ecclesiastical claimant. But no such assertion was ever made until in 1960 the Moscow regime found that the Lorain church had a priest of the Metropolia who was willing to defect rather than obey the transfer by his

superior to another parish,—the price to be that the Moscow regime keep him at Lorain.

In other words, the Moscow regime left *abandoned* for nearly forty years the claim which it now is asserting through Burdikoff; and Burdikoff in his new role as a representative of the Moscow regime is as much barred as is his new principal itself.

A religious body may lose its property rights by laches, limitation or adverse possession (*Saint Nicholas Ruthenian Ukrainian Greek Catholic Church of Rome* v. *Kapsho*, 1952, Sup. Ct. Oneida Co., 202 N. Y. Misc. 893, 114 N. Y. S. 2d 27). In the case cited the Uniat faction in a congregation of Ukrainian descent sued in ejectment to oust the Orthodox priest and his adherents. Defendants pleaded adverse possession, limitation and laches and counterclaimed to quiet title. The referee to hear and determine dismissed the complaint, saying (202 Misc. at p. 898, 114 N. Y. S. 2d at p. 31):

> "In 1929, the episcopal authorities of the Greek Catholic Church [Uniat] abandoned control of that church and from then on failed to provide the church with supervision and pastoral care. The congregation, now represented by the present defendants, took possession of the real property as an Orthodox Catholic congregation and in doing so and from then on held it publicly in a manner hostile to the title of the plaintiff. Such holding has continued from 1929 to the time of the commencement of this action, and thus covers more than the period of the Statute of Limitations in an action to repossess real property. The claim of the Greek Catholic Church to the temporal property of this congregation is a cloud on the title and such cloud should be quieted."

Accord:

> *Greek Catholic Church of St. Michael's* v. *Archbishop Platon Roizdestvensky*, 67 Colo. 217, 184 Pac. 295, 18 A. L. R. 690;

Puckett v. *Jessee*, 195 Va. 919, 81 S. E. 2d 425;

St. Paul's Reformed Church v. *Hower*, 191 Pa. 396, 43 Atl. 221.

Here thirty-six years elapsed before any claim was made by the Moscow Church to govern the Lorain church. Metropolitan Benjamin of the Moscow patriarchate came to this country in 1933, representing the *locum tenens* of the patriarchal throne, Sergius (Tr. 628-9), but he made no attempt to seize control of the Lorain church.

An action to recover title to or *possession* of real property must be brought within twenty-one years after the cause accrued (Ohio Revised Code 2305.04). While there is no express statutory provision prescribing the requisites for title by adverse possession, the courts apply the period fixed in the Statute of Limitations (*Elder* v. *McClaskey*, 1895, CCA 6th, 70 Fed. 529).

POINT V.

Burdikoff, now claiming through and as a representative of the Moscow Church, is also barred and estopped by his long, open and professed allegiance to the Metropolia whereby he continuously secured from it pastorates, emoluments and public status; and the Moscow Church is likewise barred and estopped by its laches and failure for nearly forty years to attempt to establish any suzerainty over this parish.

A strikingly similar state of facts, having also to do with a Russian Orthodox parish, was presented in the case of *Ryszko* v. *Kaimakan*, 1931, Ct. Ch., 108 N. J. Eq. 34, 153 Atl. 651.

There the priest, who had been appointed by Metropolitan Platon, then head of the Metropolia, was trans-

ferred to another parish but, instead of obeying, attempted to switch allegiance to what is now the Anastassy Synod. He was suspended by Metropolitan Platon. Vice Chancellor Backes granted an injunction against the use of the church by the priest, saying (108 N. J. Eq. at p. 39, 153 Atl. at p. 653):

> "The church of America, divided and triple headed, has led to great bewilderment of the faithful. Platon, Kedrovsky and Apollinary each claims to be the *de jure* Metropolitan and as such each rules a part of the flock in this country. * * * Which of the three, if any, is *de jure* and the other usurpers is not within the present controversy. * * * Which of the three divines is *de jure* involves the title to the office of Metropolitan and must be litigated by the principals or decided by the legally constituted church authority, to the conclusion of the civil courts. For present purposes it is enough that the proofs show that Archbishop Platon and his diocesan council continue to function over his flock (but one church of the many, Scranton, Pennsylvania, over which he rules has withdrawn from his jurisdiction and submitted to that of Bishop Apollinary) and that he holds under color of right, if not *de jure*, at least *de facto*, the office of Metropolitan of the diocesan organization of churches [Metropolia] of which St. Nicholas is an integral part, and having appointed, had the power to remove Father Kaimakan. A member priest of his group, with a handful of parishioners, cannot, upon defection and discharge, be heard to deny his jurisdiction, and set up the denial in justification of a diversion of the organization's property to a new allegiance. Their course was to quit. It was Father Kaimakan's privilege, and that of his followers, to change masters, but not to purloin the ship; to renounce the authority to which he had committed himself, but not to thwart it. It is pretty clearly indicated that his apostacy was one

> of expediency, not conscience, subterfuge not conviction, to evade discipline. Shifting allegiance was preferable to bowing to discipline; desertion to submission. * * * If the congregation had voted secession a different question would be presented, but an arbitrary minority could not deprive the congregation of its church for divine worship under guidance of its chosen spiritual leader.
>
> The contract made by trustees of St. Nicholas Church with Reverend Kaimakan for his services for a term of years, not yet expired, is subordinate to the rules of discipline of the church and was brought to an end by the severance of pastoral relations by the church authorities. The pastor was lawfully suspended.
>
> The church remains a part of the diocesan organization presided over by Metropolitan Platon and the congregation continues under his guidance. There will be an injunction."

In the case of *Waipa* v. *Kashuara*, where the final judgment sustained the validity of an order of transfer by the head of the Metropolia in the face of attacks on the canonicity of its autonomy (N. Y. L. J. January 6, 1940, aff'd, 259 N. Y. App. Div. 843, motion for leave to appeal den. 283 N. Y. 780), the main contention of the plaintiff, a parishioner suing on behalf of the congregation, was that the defendant, a disobedient priest, was estopped from denying that he was subject to the jurisdiction of Metropolitan Theophilus by reason of the fact that by various and continued acts both as to temporal and spiritual matters concerning the church, his repeated communications with the Metropolitan recognizing his authority and jurisdiction, representations made in other legal proceedings and his conduct of the church ceremonies and liturgy. Denying a motion to dismiss the complaint, Mr. Justice Patterson said (99 N. Y. L. J. 2736, June 6, 1938):

"It is pertinent to note that Kushwara in a verified complaint in the action of Kushwara *v.* Murin recognized that he was amenable to and owed obeisance to the rules, and regulations of the Metropolitan Theophilus, wherein he alleged, that 'He was and is governed by and owes obeisance to the normal statutes for the parishes of the North American dioceses of the Russian Orthodox Greek Catholic Church [Metropolia], the Metropolitan Theophilus, the titular head of such church. * * *.' *Up to a comparatively recent period, none of the parties concerned ever raised any question as to the authority of the Metropolitan, but accepted such authority and rendered themselves amenable thereto*". [Emphasis added.]

POINT VI.

The *St. Nicholas Cathedral Case*, 344 U. S. 94, and 363 U. S. 190, is the reverse of the present case; and in no event can have any bearing here.

In the *St. Nicholas Cathedral Case* the appointees of the Church in Russia had been in physical possession and use of the Cathedral ever since 1905 and had continued in such possession down to the present day. Such possession began with the appointees of the Most Holy Synod, then the appointee of Patriarch Tikhon, then one John S. Kedrovsky claiming as Archbishop appointed by Moscow and continued thereafter through a succession of Moscow appointees to the present. The narrative is told in detail in 302 N. Y. 1, 96 N. E. 2d 56; 306 N. Y. 38, 114 N. E. 2d 197; 7 N Y 2d 191, 164 N. E. 2d 687; 344 U. S. 94.

Not until April, 1945, did the Metropolia (Metropolitan Theophilus Pashkovsky) institute an ejectment suit to oust the Moscow regime from the Cathedral; and at no time thereafter did the Metropolia or its Metropolitans succeed

in securing possession. This Court held that, inasmuch as the Mother Church was in continuous possession and operation of the Cathedral, it could not be ousted therefrom and control over it transferred to another religious organization either by fiat of the New York legislature or by exercise of state power by the New York courts.

As said by Mr. Justice Frankfurter in his concurring opinion (344 U. S. 94, 121):

> ". . . St. Nicholas Cathedral is not just a piece of real estate. . . . A cathedral is the seat and center of ecclesiastical authority. . . ."

In short, the Cathedral was under physical administration by the ecclesiastical authority of the Moscow regime; and, as said by Mr. Justice Reed (p. 119), there was no power in the legislature to displace "one church administrator with another" or to pass "the control of matters ecclesiastical from one church authority to another".

But here the situation is the reverse. Here it is the Moscow regime which is seeking to oust and to terminate an ecclesiastical authority which has been in one continuous possession and control, adverse to all the world, for nearly forty years.

POINT VII.

Even if, contrary to the foregoing principles, the Court should find occasion to examine the canonicity of the Metropolia, it is not bound by anything in the *Kreshik* case to outlaw the Metropolia.

The case at bar is as different from *Kreshik* v. *St. Nicholas Cathedral*, 363 U. S. 190 (decided a few days before Burdikoff defected in June 1960) as day is from night.

1. In the *Kreshik* case, the representatives of the independent Metropolia sought by ejectment to oust the representatives of the Moscow patriarchate from the New York Cathedral, whereas here a renegade priest is seeking to subvert the Lorain church from the Metropolia and to subject it instead to the Moscow patriarchate.

2. Respondents here, adherents of the Metropolia, are in possession of the Lorain church by virtue of a decree of a court in 1925 quieting title in their favor and by open, public and constant use for some forty years. In the *Kreshik* case, on the other hand, it was the representatives of the Moscow Church who held continuous possession of the cathedral under a judgment of many years standing.

3. Saint Nicholas Cathedral was appointed to be the central see of the Russian Orthodox Church in America. Its construction had been financed largely by contributions from Russia. The Lorain church, on the contrary, was constructed entirely with funds raised by the local congregation. Not a penny came from Russia (Tr. 434; 437).

4. Thus it was one thing for this Court to hold that, irrespective of the fact that it was communist dominated and controlled, the Moscow patriarchate was nevertheless entitled to continue in the use and possession of Saint Nicholas Cathedral which was built for its benefit as a "shelter" for the appointee of the Church in Russia. It is quite another matter to hold here that this apostatizing priest may flout an order of a court quieting title in these respondents of some forty years standing and turn this church, built by the local congregation for their worship, over to the control of the soviet-dominated Moscow patriarchate in defiance of the wishes of 90% of the congregation.

If petitioners' position were correct, there would be nothing to prevent the Moscow patriarchate from wresting control of every Russian Orthodox parish and pulpit in the United States from loyal American hands and turning each of the 420 churches and chapels of the Metropolia into a lethal transmission belt for soviet propaganda.

In the *Saint Nicholas Cathedral* case, this Court did not, for it could not, reverse the finding of the New York Court of Appeals (7 NY 2d 191, 204, 164 N. E. 2d 687, 693):

> "... that the domination of the Patriarchate by the Communist government, and the necessary subservience of the church in Russia to the Soviet State have been conclusively proved and confirmed. ..."

This Court did hold that such domination and subservience were immaterial because, to quote the New York Court of Appeals (7 NY 2d at p. 205, 164 N. E. 2d at p. 693):

> "No one disputes that, prior to any time of trouble or dissension, St. Nicholas Cathedral had been dedicated as the See of the North American Diocese of the Russian Orthodox Church and was to be used and controlled by the Archbishop of the diocese who was in turn appointed by and subject to the Holy Synods ... or, in 1918, the Patriarch of Moscow".

To reiterate, this Court held that the Patriarch of Moscow was entitled to the continued use and occupancy of the Cathedral which had been dedicated to the benefit of the appointee of the Church in Russia and for decades had housed such appointee, regardless of whether the patriarchate was under the soviet thumb. Here, however, the representatives of the Moscow patriarchate seek to wrest this Church from its faithful for whose use and benefit it was dedicated as their House of Worship.

POINT VIII.

Respondents are not estopped by the *Saint Nicholas Cathedral Case.*

Petitioners invoke the doctrine of "collateral estoppel" in an attempt to set up the judgment in the New York case as a bar to this action.

But not only, as has been indicated, was that case the reverse of this, in that there appointees of the Church in Russia had been in possession of the premises for over forty years, and that case presented none of the defenses to Moscow's claim that are here presented viz., *res judicata*, limitations, laches, estoppel, adverse possession and clean hands, but the parties were different.

Petitioners would have the Court believe that the case at bar is a contest between Metropolitan Leonty and the Moscow Patriarch, their respective agents and privies. This oversimplification is not supported by the record. Respondents are the parish corporation and the duly elected committee (parish council) suing on behalf of the congregation. While it is true that respondents are loyal adherents of their Metropolitan, they and the class which they represent have rights and defenses in this suit that are personal to them and not to the Metropolitan. For example, it is respondents and their forbears, not the Metropolitan, who built, embellished and maintained the Lorain church throughout the years. It was respondent corporation, not the Metropolitan, which brought the suit to quiet title in 1925 and obtained judgment against the Moscow appointee. It was the congregation, not the Metropolitan, which contributed annually to the support of the Metropolia. It was the congregation, not the Metropolitan, which paid petitioner Burdikoff a salary, and gave him the use of the

rectory, in reliance on his representation that he was a priest of the Metropolia, loyal to its hierarchy and organic statute.

On the other hand, there are defenses to the claim of petitioners which, conceivably, might not be available against the Patriarch e.g. estoppel and clean hands.

Furthermore, new facts have appeared which were not before this Court in the *Saint Nicholas Cathedral* case. One of the most important of these is the admission of the Moscow Church to the World Council. In the words of Judge Hunsicker (Pet. p. 36):

> "... The Patriarch of Moscow has brought the Russian Orthodox Church into the World Council of Churches, thereby recognizing the Metropolia as an autonomous church."

This fact alone would prevent the operation of the "collateral estoppel" invoked by petitioners.

POINT IX.

The St. Nicholas Cathedral decisions are authorities for, not against, respondents' position.

In the *Kedroff* decision (344 U. S. 94) this Court held §§105 and 107 of Article 5-C of the Religious Corporations Law of the State of New York (50 McKinney's N. Y. Laws), as applied to the use and occupancy of Saint Nicholas Cathedral, to be invalid. Mr. Justice Reed said (344 U. S. at p. 119):

> "... By fiat it [Article 5-C] displaces one church administrator with another. It passes the control of matters strictly ecclesiastical from one church authority to another. It thus intrudes for the benefit

> of one segment of a church the power of the state into the forbidden area of religious freedom contrary to the principles of the First Amendment. . . ."

In the *Kreshik* decision (363 U. S. 190) the Court said (at p. 191):

> ". . . the decision now under review [7 NY 2d 191, 164 N. E. 2d 687] rests on the same premises which were found to have underlain the enactment of the statute struck down in *Kedroff*. . . . our ruling in *Kedroff* is controlling here, and requires dismissal of the complaint."

Mr. Justice Reed's language above quoted is exactly applicable to the case at bar. Petitioners would have the State of Ohio, through its judicial branch, displace the Metropolia, which for thirty-eight years has governed the Lorain church, with the Moscow patriarchate. By so doing the State of Ohio would pass "the control of matters strictly ecclesiastical from one church authority to another" and thus intrude "for the benefit of one segment of a church the power of the state into the forbidden area of religious freedom".

Both the federal and the Ohio constitutions forbid such intrusion.

POINT X.

Respondents' entire "argument" is open acknowledgment of their real objective in this suit, namely, to seek a ruling which could be used to oust the entire Metropolia from *all* its parishes, seminaries and properties, and to transfer possession and authority to the Moscow Patriarchate with power to dispossess by court decree and by ecclesiastical excommunication hundreds of thousands of Americans who for two generations have worshipped under, and enlarged by their means, the Metropolia.

(1) In short, they are asking this Court to make the First Amendment and the Ohio constitution and the *Saint Nicholas Cathedral Case operate in reverse*, and become lethal weapons for ousting and destroying an entire fully organized and [illegible]anding American religious establishment, and for capturing its pulpits, its multitudinous communicants and its properties worth many millions of dollars, notwithstanding that denomination's nationwide recognized status and its accepted membership in the National Council of Churches, the World Council of Churches and the Standing Conference of Canonical Orthodox Bishops in the Americas.

(2) Of this dominant objective petitioners and the Moscow regime operating through them make no secret. Their petition repeatedly puts it baldly (p. 17):

> "... The determination of the right to use and occupy the Lorain parish depends upon whether Leonty or Dositheus is the ruling hierarch for the American churches."

Again, their petition describes the issue as (pp. 17-18):

> ". . . whether Leonty, who was elected to his ecclesiastical office by a sobor of the American churches, or the appointee of the Patriarch of Moscow, is the ruling hierarch for the American churches. The instant case and the *Kedroff* and *Kreshik* cases involve the identical question as to who is entitled to the use and occupancy of a church of the Russian Orthodox denomination as between disputants who are adherents of such faith."

Obviously, if these claims were expressly or impliedly upheld by American courts, the Patriarchate in Moscow could appoint ecclesiastics and other deputies to take over every parish and institution of this American denomination, and excommunicate every one who resisted, and seize for Moscow *as the great prize* all that denomination's properties and all of its pulpits throughout the length and breadth of the United States.

(3) In the only other instances where, under comparable circumstances, such a monstrous attempt at expropriation of an entire denomination and all its property by a foreign ecclesiastical aspirant has come before our American courts, it was summarily slapped down,—*Romanian Orthodox Episcopate of America* v. *Trutza*, 120 F. Supp. 183; aff'd 205 F. 2d 107; cert. den. 346 U. S. 915, motion to file pet. for cert. den. 364 U. S. 809; and *Russian Orthodox Church of the Transfiguration* v. *Lisen*, an unreported decision by the Superior Court of California (*supra*, pp. 15-17).

(4) The fact is inescapable, and has been affirmed by all three branches of the American government, that in Russia religious freedom does not exist in the sense in which American citizens have a constitutional right to believe in

religious freedom and to create their own religious establishments.

See, for example, the explicit findings of Congress in the National Security Act (50 U. S. C. A. §§781, Sec. 2(1) and (2) which only in June, 1960 were made the basis of the decisions in *Communist Party* v. *Control Board*, 367 U. S. 1, 4, 5; *Scales* v. *United States*, 367 U. S. 203).

See also the judicial determinations in the *Kreshik* case itself that the Moscow regime was a "tool exploited by the State", and that the atheistic Communist Dictatorship imposed "the domination of the Patriarch by the secular power".

Indeed, these facts were and are of such everyday knowledge and public record since the Bolshevik Revolution, that judicial notice thereof is easily justifiable.

Furthermore, when in 1924 the All American Sobor met, the former tie between the American Church and the Moscow Patriarchate had been openly and effectively broken by the atheist State. The Patriarch himself had been imprisoned; and in 1925 the Patriarchate itself was abolished and remained so for twenty years.

(5) To deny, as does the petition, that the American Church then had the right to believe that independence was necessary to its own preservation and religious freedom is to deny the First Amendment itself and to assert that the American Church had no alternative to disintegration in confusion and chaos.

To save itself and to assure its future from what it had the right to believe would be open or hidden domination or encroachment by an atheist Communist Dictatorship seeking world-overlordship, the American Church did exactly what the Russian Church itself did in 1448 when the Turks were besieging Constantinople, the then seat of East-

ern Orthodoxy,—it declared and organized and ever since has maintained it own independence and organization (Columbia Encyclopedia [1946 ed.] p. 1314; and *St. Nicholas Cathedral* v. *Kedroff*, 276 App. Div. 309, 341-2).

(6) Surely, under the First and Fourteenth Amendments, the descendants of the body of communicants who thus organized an independent religious establishment in 1924 *also* have a continuing constitutional right to believe, precisely as American public opinion itself believes, that the Communist Totalitarianism in Russia incorporates all within its grasp into its own monolithic dominion, requires subservience to its internal and external policies, and promotes atheism and materialism as its official "religion".

Surely also, the two generations of Americans which have followed the 1924 Founders, have a right under the First and Fourteenth Amendments to continue to believe that the secular dominion over the Moscow religious regime still continues, and that in furtherance of its political purposes it could and would be used in this country to extend its sway over any American Church governed from Moscow.

The right to freedom of religious belief includes the right to reject a religious organization believed not to be free.

Americans have a constitutional right to fashion a religious establishment which is assuredly free rather than to be forced into one which is suspect. Otherwise the First Amendment is meaningless.

(7) Hence, all the elaborate discussion in the petition about "schism" and "canonicity" and the artful play upon the words "Russian Orthodox", are merely disguised ways of attempting to deny to about a million Americans their constitutional right to freedom of opinion, religious belief, worship and organization of a religious establishment. It

is more. It is an attempt to seize all the religious property which the communicants of this American Church have accumulated for the last forty years.

The Moscow regime cannot use its slogans of "schism" and "canonicity" to override in this country the First Amendment or to commingle Church and State. For this reason, this Court said in the *Watson* case, 80 U. S. (13 Wall.) 679, 728:

> "The law knows no heresy, and is committed to the support of no dogma, the establishment of no sect."

(8) Russian Orthodox Greek Catholic Church of America (Metropolia) is a distinctive name. It is altogether different from "the Archdiocese of North America and the Aleutian Islands of the Russian Orthodox Greek Catholic Church".

The Metropolia came into being with a Metropolitan as its head at the All American Sobor in 1924. As such it is recognized throughout the United States and by the National and World Councils of Churches for all denominational, ecclesiastical and property purposes.

(9) In sum, the real issue here is whether in the face of constitutional guarantees of freedom of religious belief, worship and organization, American courts will so accept a cry of "schism" from Moscow as to put under the yoke of a foreign ecclesiastic an American religious body of forty years existence, with nearly a million communicants and with properties worth millions.

To do so even impliedly or by inference would, we say again, cause the Constitution and the *Kreshik* case itself to negate themselves.

The Moscow Patriarchate is, of course, free to have its own denomination in the United States and to conduct it within the restrictions of our Security Laws.

Conclusion.

Petitioners are attempting to cause the First Amendment to the Constitution of the United States and the corresponding section of the Ohio Constitution to work in reverse. Namely, to force our courts to disestablish an autonomous ecclesiastical organization established and recognized for nearly forty years and then to turn over all it has, including priesthood, to a foreign, alien ecclesiastical regime, contrary to the rights and wishes of the American constituency. We further maintain that waiver, laches, estoppel and adverse possession conclusively called for the judgment below.

For the foregoing reasons the petition should be denied.

Respectfully submitted,

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